

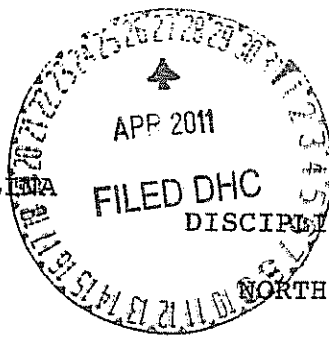
STATE OF NORTH CAROLINA

WAKE COUNTY

THE NORTH CAROLINA STATE BAR,  
Plaintiff,

v.

STEVEN E. PHILO, Attorney,  
Defendants.



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
11 DHC 6

ANSWER

AS AN ANSWER to the Plaintiff's Complaint, Defendant, Steven E. Philo ["Philo"], responds to the allegations in the Plaintiff's Complaint as follows:

1-3. Philo admits the allegations of paragraphs #1-#3.

First Claim for Relief

4. Philo incorporates by reference his responses to the allegations in paragraphs #1-#3 of the Complaint, as if fully set forth and restated.

5. Philo admits the allegations of paragraph #5.

6. Philo admits that Ultima WNC Development, LLC ["Ultima"], as Seller, entered many Purchase Agreements for the sale of Wildflower lots that included a Contract Addendum requiring Ultima, after closing and the disbursement of proceeds to Seller, to deposit a specified amount of funds into an escrow account for the benefit of the buyer at a designated bank ["the Escrow Account Addendum"]; that the Escrow Account Addendum provided that the funds in the escrow account would pay the buyer's monthly mortgage payments until the escrow account was depleted; and that buyer was entitled to receive any funds remaining in the escrow account should buyer resell the property before depletion of the escrow account. Except as expressly admitted, Philo denies the allegations of paragraph #6.

7. Philo admits that Macon Bank provided buyers loans to purchase Wildflower lots from Ultima in at least 21 transactions. Except as expressly admitted, Philo is without sufficient knowledge or information to form a belief as to the

truth of the allegations of paragraph #7 and, therefore, denies such allegations.

8. Philo admits that Macon Bank has acknowledged that it knew that the Wildflower Purchase Agreement included an Escrow Account Addendum before closing in at least four Wildflower lot-purchase transactions it funded and that Macon Bank approved these loans. Except as expressly admitted, Philo denies the allegations of paragraph #8.

9. Philo admits, upon information and belief, that by August 3, 2007, Macon Bank advised all Macon Bank lending employees, by an internal email, that "Seller paid interest carry, ... [l]arge credits, discounts, or huge price reductions" would not be allowed on lot loans made upon new applications received thereafter; that by August 23, 2007, Macon Bank advised Ultima and Beverly-Hanks Mortgage Services ["Beverly-Hanks"], a mortgage broker that had brokered multiple Wildflower lot loans to Macon Bank, that it would "typically not allow[]" prepaid interest, rebates, or large discounts for Wildflower lot loans made upon new applications received after that date; and that sometime thereafter, in or around late August 2007, Macon Bank advised Ultima and Beverly-Hanks that it would no longer approve "Seller paid interest" for any lot loan. Except as expressly admitted, Philo denies the allegations of paragraph #9.

10. Philo admits that he conducted closings of Wildflower lot purchases funded by Macon Bank loans from around late October 2006 through early October 2007. Except as expressly admitted, Philo denies the allegations of paragraph #10.

11. Philo admits that Macon Bank provided him closing instructions prohibiting "Seller paid interest" in six Wildflower lot closings, as described in the "Purchaser(s)," "Lot Number," and "Specific Closing Instructions" columns of the table in paragraph #11. Except as expressly admitted, Philo denies the allegations of paragraph #11.

12. Philo admits that the Wildflower Purchase Agreement for the six transactions referenced in paragraph #11 all included the Escrow Account Addendum. Macon Bank specifically denies that Macon Bank received the loan application for any of the six transactions referenced in paragraph #11 after August 23, 2007. Except as expressly admitted, Philo denies the allegations of paragraph #12.

13. Philo admits that his closing files for the six transactions referenced in paragraph #11 contained these buyers'

respective Purchase Agreements, including the Escrow Account Addenda, and that he was aware of the Escrow Account Addendum in each of these closings. Except as expressly admitted, Philo denies the allegations of paragraph #13.

14. Philo admits that at the time of the subject closings, it never occurred to him that Macon Bank did not have the same Purchase Agreement that had been provided to him but that, with the benefit of hindsight and the heightened awareness resulting from the real estate and development downturn, Macon Bank's provision of Closing Instructions providing, in part, "no Seller paid interest" despite the Escrow Account Addendum should have raised questions. Except as expressly admitted, Philo denies the allegations of paragraph #14.

15. Philo admits the allegations of paragraph #15.

16. Philo admits that the HUD-1 Settlement Statements for the six transactions referenced in paragraph #11 only showed funds paid to and disbursed by the Settlement Agent at closing and did not show Ultima's post-closing payment of Macon Bank's monthly mortgage charges. Except as expressly admitted, Philo denies the allegations of paragraph #16.

17. Philo admits that the practical effect of the Escrow Account Addendum, where no resale occurred, was 0% interest on the purchase loan for some period of time. Except as expressly admitted, Philo denies the allegations of paragraph #17.

18. Philo admits that in the six transactions referenced in paragraph #11, he reported the full "contract purchase price" on Line 101 of the HUD-1 Settlement Statements and reported the price the commission was based upon, the brokerage fee percentage, and the brokerage fee on Lines 700 and 701 of the HUD-1 Settlement Statements, pursuant to written Brokerage Fee instructions Ultima provided him. Philo specifically denies that he personally calculated the commissions for these Wildflower lot purchase transactions, and Philo specifically denies that any of Ultima's Brokerage Fee instructions ever made any express or direct reference to "interest cash back" or the Escrow Account Addendum provisions. Except as expressly admitted, Philo denies the allegations of paragraph #18.

19. Philo denies the allegations of paragraph #19.

Philo denies the allegations of the unnumbered paragraph at the end of the First Claim for Relief, including subparagraphs (a) and (b) thereof. Philo specifically denies that it ever

occurred to him that Macon Bank and he had been provided purchase agreements with material differences and that he ever acted or omitted to act with any fraudulent, deceitful, or dishonest intent.

#### Second Claim for Relief

20. Philo incorporates by reference his responses to the allegations in paragraphs #1-#19 of the Complaint, as if fully set forth and restated.

21. Philo admits that Macon Bank provided him closing instructions prohibiting large credits without underwriting's pre-closing approval in four Wildflower lot closings, as described in the "Purchaser(s)," "Lot Number," and "Specific Closing Instructions" columns of the table in paragraph #21. Except as expressly admitted, Philo denies the allegations of paragraph #21.

22. Philo admits that the Wildflower Purchase Agreement for the four transactions referenced in paragraph #21 all included the Escrow Account Addendum. Philo specifically denies that Macon Bank received the loan application for any of the four transactions referenced in paragraph #21 after August 23, 2007. Except as expressly admitted, Philo denies the allegations of paragraph #22.

23. Philo admits that his closing files for the four transactions referenced in paragraph #21 contained these buyers' respective Purchase Agreements, including the Escrow Account Addenda, and that he was aware of the Escrow Account Addendum in each of these closings. Except as expressly admitted, Philo denies the allegations of paragraph #23.

24. Philo admits that the practical effect of the Escrow Account Addendum, where no resale occurred, was 0% interest on the purchase loan for some period of time. Except as expressly admitted, Philo denies the allegations of paragraph #24.

25. Philo denies the allegations of paragraph #25.

26. Philo admits that in the four transactions referenced in paragraph #21, he reported the price the commission was based upon, the brokerage fee percentage, and the brokerage fee on Lines 700 and 701 of the HUD-1 Settlement Statements, pursuant to written Brokerage Fee instructions Ultima provided him. Philo specifically denies that he personally calculated the commissions for these Wildflower lot purchase transactions, and

Philo specifically denies that any of Ultima's Brokerage Fee instructions ever made any express or direct reference to "interest cash back" or the Escrow Account Addendum provisions. Except as expressly admitted, Philo denies the allegations of paragraph #26.

27. Philo admits that he closed the four transactions referenced in paragraph #21. Except as expressly admitted, Philo denies the allegations of paragraph #27.

28. Philo admits that in the four transactions referenced in paragraph #21, he reported the full "contract purchase price" on Line 101 of the HUD-1 Settlement Statements and reported the price the commission was based upon, the brokerage fee percentage, and the brokerage fee on Lines 700 and 701 of the HUD-1 Settlement Statements, pursuant to written Brokerage Fee instructions Ultima provided him. Philo specifically denies that he personally calculated the commissions for these Wildflower lot purchase transactions, and Philo specifically denies that any of Ultima's Brokerage Fee instructions ever made any express or direct reference to "interest cash back" or the Escrow Account Addendum provisions. Except as expressly admitted, Philo denies the allegations of paragraph #28.

29. Philo denies the allegations of paragraph #29.

Philo denies the allegations of the unnumbered paragraph at the end of the Second Claim for Relief, including subparagraphs (a) and (b) thereof. Philo specifically denies that it ever occurred to him that Macon Bank and he had been provided purchase agreements with material differences and that he ever acted or omitted to act with any fraudulent, deceitful, or dishonest intent.

AS FURTHER ANSWER AND DEFENSES, the Defendant says and alleges the following:

First Affirmative Defense: Macon Bank's Knowledge

Philo pleads Macon Bank's knowledge in his defense. The grounds for this defense include but are not limited to the following: First, in the 4 undisputed closings, closed between August 7 and August 21, 2007, Macon Bank reviewed and approved Philo's completion of the HUD-1 Settlement Statements before funding such closings. In the 9 transactions in question in this proceeding, Macon Bank likewise reviewed and approved Philo's completion of the HUD-1 Settlement Statements before funding such closings. With its admitted knowledge of the

Escrow Account Addenda in the 4 undisputed closings, Philo's consistent completion of the HUD-1 Settlement Statements, including the parallel treatment of Lines 101 and 701, gave Macon Bank notice and knowledge of the Escrow Account Addenda in the nine transactions in question in this action. Second, Macon Bank received, processed, and accepted monthly mortgage payments made by hard-copy checks drawn on bank accounts in Ultima's name on all Ultima lot purchase loans that Macon Bank made in 2006 and 2007. Macon Bank had processed and accepted Ultima check payments for buyers who had not disclosed Escrow Account Addenda or Seller-funded mortgage payment arrangements for almost a year before it closed on the loans in question in this proceeding. Third, Macon Bank had communications with two sets of Wildflower lot purchasers and directly with Ultima expressly regarding the payment of such buyers' monthly mortgage loans by checks issued from an Ultima account, the first set of such communications occurring in late 2006 and the second set occurring on August 20 & 21, 2007.

Second Affirmative Defense: Meaning of "Credit"  
for purposes of Macon Bank Closing Instructions

In his defense, Philo pleads Macon Bank's definition of and meaning in using the term "credit" for the purposes of its lot loan closing instructions. The grounds for this defense include but are not limited to the following: Macon Bank's Senior Underwriter admitted under oath that a "credit" for the purposes of Macon Bank lot loan parameters was something "that was part of the closing" and was "different from a seller paid interest arrangement that would occur after the closing." Macon Bank's CEO testified under oath that a "credit" in the context of a lot loan transaction was something "involv[ing] a credit that applied at the time of the closing," at least typically.

Third Affirmative Defense: Course of Dealing

In his defense, Philo pleads Macon Bank's course of dealing with him as demonstration that nothing in the HUD-1 Settlement Statements was intended to or in fact deceived or misled Macon Bank. The grounds for this defense include but are not limited to the following: Philo closed the four Wildflower lot purchases referenced in paragraph #8 of the Complaint, which Macon Bank admittedly funded with full knowledge that the Purchase Agreements included the Escrow Account Addenda ["the 4 undisputed transactions"]. The HUD-1 Settlement Statements for the 4 undisputed transactions did not show Ultima's post-closing payment of Macon Bank's monthly mortgage charges. The HUD-1 Settlement Statements for the 4 undisputed transactions all

reported the full, unadjusted "contract purchase price" on Line 101 of the HUD-1 Settlement Statement and reported the different price that the commission was to be based upon, the brokerage fee percentage, and the brokerage fee on Lines 700 and 701 of the HUD-1 Settlement Statements, in accordance with written Brokerage Fee instructions Ultima provided. Macon Bank reviewed and approved the HUD-1 Settlement Statements for the 4 undisputed transactions before funding such closings, occurring between August 7 and 21, 2007. Philo completed the HUD-1 Settlement Statements in this action in like manner, consistent with the HUD-1 Settlement Statements Macon Bank approved for the 4 undisputed transactions.

Fourth Affirmative Defense: Good Faith; Standard of Practice

In his defense to the fraud and dishonesty charges in this proceeding, Philo pleads his good faith completion of the HUD-1 Settlement Statements consistent with the prevailing standard of practice in Franklin, North Carolina at the relevant time. The grounds for this defense include but are not limited to the fact that at least two other attorneys closing Ultima lot purchases based upon Purchase Agreements including the Escrow Account Addenda and funded by Macon Bank reported the full "contract purchase price" on Line 101 of the HUD-1 Settlement Statement and did not otherwise report Ultima's post-closing mortgage payments on the HUD-1 Settlement Statements.

Ffith Affirmative Defense: Mitigating Factors

In the event the Disciplinary Hearing Commission determines that the State Bar establishes charges of misconduct (which Philo respectfully denies) by clear, cogent, and convincing evidence in this matter (which Philo respectfully denies), then in such event, Philo pleads the pertinent mitigating factors in 27 NCAC 1B § .0114(w)(2), including but not limited to character and reputation and the absence of dishonest or selfish motive.

WHEREFORE, the Defendant prays the Disciplinary Hearing Commission as follows:

1. That the Disciplinary Hearing Commission determine that the State Bar has not established the charged misconduct by clear, cogent, and convincing evidence, take no disciplinary action thereon, and dismiss this action;

2. That the costs of this action be taxed against the State Bar; and

3. For such other and further relief as the Court may deem just and proper.

This the 27<sup>th</sup> day of April, 2011.

LONG, PARKER, WARREN, ANDERSON & PAYNE, P.A.  
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By: 

Philip S. Anderson  
N.C. State Bar No 21323  
Robert B. Long, Jr.  
N.C. State Bar No 2787

CERTIFICATE OF SERVICE

This is to certify that I have this day served the parties in this action with a copy of this Answer in the manner prescribed by Rule 5 of the North Carolina Rules of Civil Procedure, by placing the copy in the U.S. mail in a postpaid envelope properly addressed as follows:

Jennifer Porter  
North Carolina State Bar  
P.O. Box 25908  
Raleigh, NC 27611

This the 27<sup>th</sup> day of April, 2011.

By: 

Philip S. Anderson